No. 74

IN THE

Supreme Court of the United States

October Term, 1959

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
and
PACIFIC MOTOR TRUCKING CO. and
GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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APPELLANTS' BRIEF ON THE MERITS

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OPINION BELOW

The opinion of the United States District Court for the District of Columbia (R. 70) is reported at 170 F. Supp. 38. The consolidated report and order of the Interstate Commerce Commission in the Sub. 34-37 cases (R. 8) is reported at 77 M.C.C. 605; its first report and order in the Sub. 34 case (R. 54) is reported at 71 M.C.C. 561.

JURISDICTION

The judgment of the District Court (R. 87) was entered on January 30, 1959, and notice of appeal (R. 88) was filed on March 27, 1959. Probable jurisdiction was noted on October 12, 1959 (R. 92), 361 U.S. 806. Jurisdiction to review the decision on direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §1, and Sections 5(2)(a) and (b), 17(9), 205(g) and (h), 207(a), 209(b), and 210 of the Interstate Commerce Act, 49 U.S.C. §§5(2)(a) and (b), 17(9), 305 (g) and (h), 307(a), 309(b), and 310, are set forth verbatim in Appendix A hereof.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as those disclosed in *American Trucking Associations, Inc., et al.* v. *U.S., et al.*, 355 U.S. 141, may authorize a railroad subsidiary to conduct completely unrestricted[1] motor contract carrier operations to all points on its parent railroad's lines?

2. Whether the District Court correctly found the existence of "special circumstances" justifying the performance of unrestricted motor service by the rail subsidiary, such findings being directly contrary to those of the Commission itself?

3. Whether the 1957 amendments to the provisions of the Interstate Commerce Act, Part II, dealing with motor

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[1] Undoubtedly appellees will argue, as they did before the District Court, that the authority granted is not "unrestricted." We deal with this matter at pp. 31-34, *infra*.

contract carriers, were intended to alter the Congressional policy against rail entry into the motor carrier field?

4. Whether the Interstate Commerce Commission, without satisfying the requirements of, or observing the policy underlying, §210 of the Interstate Commerce Act, may validly issue a contract carrier permit to a railroad's motor-carrier subsidiary under the following circumstances:

a. Where the subsidiary also holds a common carrier certificate authorizing the transportation of closely-related commodities for the same shipper and receivers and within the same territory?

b. Where the parent company engages in transportation of the same commodities as a rail common carrier, for the same shipper and receivers, as well as competing automobile manufacturers and their dealers, within the same territory?

5. Whether independent motor carriers, found by the Commission to be "authorized to conduct the proposed operations" and motor-carrier associations, all of whom were protestants before the Interstate Commerce Commission, have standing to bring suit to set aside its report and order authorizing unrestricted motor service by a rail subsidiary?

STATEMENT

Basically, this case involves the validity of the action of the Interstate Commerce Commission in authorizing Pacific Motor Trucking Co. (hereinafter PMT), a wholly-owned subsidiary of the Southern Pacific Co., a common carrier by railroad, to perform unrestricted motor contract carriage over a wide area in the western United States, in the absence of any finding of special circumstances justifying such a grant of authority, and indeed in the teeth of a finding by the Commission (77 M.C.C. 623; R. 31) that there had been no showing of "unusual conditions."

The Commission's consolidated report and order dated September 9, 1958, granted authority to transport General Motors' automobiles and trucks from assembly plants at Oakland, Raymer and South Gate, Calif., to all points on the lines of the parent railroad in Arizona, Nevada, New Mexico, Oregon and Utah, as well as the off-line points of Austin, Tonopah, and Yerington, Nevada, as more specifically set forth in the appendix therein (77 M.C.C. 629; R. 39).

PMT, in addition to the contract operations here involved, also conducts widespread motor common carrier operations,[2] largely restricted to so-called auxiliary and supplemental service (77 M.C.C. 612-613; R. 18). Its present interstate contract carrier operations[3] are relatively negligible, being limited to authority to transport new General Motors' automobiles, trucks and buses (1) from Oakland, Calif. to Hawthorne, Carson City and Minden, Nevada, and points in Nevada on its rail parent's lines, (2) from Raymer, Calif., to points in the Los Angeles Harbor commercial zone, and (3) between Los Angeles and Calexico and San Ysidro, Calif. (77 M.C.C. 613; R. 18).[4] Its applications to secure its present contract carrier rights were unopposed before the Commission.

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[2] The scope of PMT's common carrier operations can be gauged somewhat by the fact that its operating certificate (Exhibit 30 in the Sub. 37 case) consists of 78 pages. For the 11 months ended Nov. 30, 1956, its operating revenues exceeded 26 million dollars. R. 361.

[3] Although the extensive authority granted by the Commission in the proceedings under review has become effective through refusal of the District Court to issue a temporary restraining order, we shall, for clarity, refer to PMT's "present" authority as that existing prior to the instant grant.

[4] A better indication of the relative insignificance of PMT's "present" interstate operations is found in the statement of its counsel. Of total movements by PMT in 1955 of 175,951 vehicles, only 6,100, or less than 3.5%, moved interstate. R. 468-469.

By applications filed on the dates noted, PMT sought authority to provide unrestricted motor contract carrier service as a transporter of new General Motors automobiles, trucks and buses, from and to the points shown:

Sub. No.	Date Filed	Origin	Destination
34	10/14/55	Oakland, Calif.	Points in Oregon which are stations on the lines of PMT's rail parent.
35	3/ 5/56	Oakland, Calif.	Austin, Tonopah, and Yerington, Nev.
36	3/ 9/56	Raymer, Calif.	Points in Arizona which are stations on the lines of PMT's rail parent.
37	10/23/56	Oakland, Calif.	Points in Ariz., Idaho, Nev., N. M., Ore., Utah, and Wash.
		Raymer, Calif.	Points in Ariz., Idaho, Nev., N. M., Ore., Utah, and Wash., with specified exceptions.
		South Gate, Calif.	Points in Ariz., Idaho, Mont., Nev., Ore., Utah and Wash.

In the Sub. 34 and 35 cases, a Joint Board and examiner, after hearings, recommended that PMT's applications be granted, but the Commission, division 1, stayed the taking effect of the recommended orders pending further order of the Commission. In the Sub. 36 and 37 cases, a joint board and examiner recommended that the applications be granted. While the latter two cases were pending on exceptions before the Commission, it issued its first report and order in the Sub. 34 case, *Pacific Motor Trucking Co., Ext., Oregon,* 71 M.C.C. 561, approving the relatively limited authority there sought. Upon petition, the Commission granted reconsideration in the Sub. 34 case and consolidated all four proceedings for disposition in one report. By its report and order dated September 9, 1958, the Commission, by a 5-4 division,[5] authorized the broad grant of unrestricted authority here involved.

[5] Commissioners Minor and Goff did not participate. Although Commissioner Walrath also did not participate, his statement, at 77 M.C.C. 629 (R. 38), makes clear that for all practical purposes he may be counted as dissenting.

On appeal, the District Court upheld the Commission's order, but found, contrary to the Commission's holding, that "special circumstances" justified the grant of authority. (170 F. Supp. 45; R. 81). Further, a majority of the court below held, as urged by intervening defendants PMT and General Motors but not the Commission, that plaintiffs lacked standing to challenge the Commission's order. (170 F. Supp. 48; R. 86).

SUMMARY OF ARGUMENT

1. The Congressional policy embodied originally in Sections 202(a) and 213 of the Motor Carrier Act, 1935, now included in the National Transportation Policy and Section 5(2)(b) of the Interstate Commerce Act, respectively, was clearly intended to prevent all-out rail entry into the motor carrier field. As interpreted by the Commission and this Court,[6] this intent has been translated into the practice of allowing railroad use of motor vehicles to improve overall train service—for example, by substituting the truck for the slow and cumbersome way-train or peddle car out of large break-bulk points on the rail's lines—a type of service now commonly identified as "auxiliary and supplemental." At the same time, railroads have consistently been rebuffed in their efforts to enter the field of truck service on the same basis as independent motor carriers, in all-out competition with such carriers, and indeed, with their own rail service. The one notable exception to this consistent application of the underlying Congressional policy was the Commission's recent decision in *Rock Island Motor Transit Co. Common Carrier Application*, 63 M.C.C. 91, *affirmed*, *American Trucking Assn's.* v. *United States*, 355 U.S. 141, hereinafter some-

[6] Largely in cases involving applications to perform motor *common* carrier service. However, the Commission's report here involved concedes that "the same principle" applies whether a railroad or its affiliate seeks motor common or contract carrier rights. 77 M.C.C. 621-622; R. 29.

times called the *A.T.A.* case. The Commission's decision, allowing the rail subsidiary to perform unrestricted truck service, was based solely on its finding of "exceptional circumstances," i.e., the failure of the independent motor-carrier protestants to render adequate service in the area involved. Here, the Commission specifically found an "absence of any showing of unusual conditions in these proceedings." (77 M.C.C. 623; R. 31) In view of this finding, we submit the Commission had no proper alternative except to deny the application or so condition its grant of authority as to allow the performance only of auxiliary and supplemental service by the rail subsidiary. It did neither. To be sure, the Commission paid lip service, in a way, to this Court's decision in the *A.T.A.* case, *supra*, when it quoted in passing (77 M.C.C. 621; R. 29) the language from its opinion which so clearly discloses that the Commission does not have a free hand in issuing motor rights to railroads or their affiliates.[7] But, to paraphrase the language of Mr. Justice Frankfurter, dissenting, in *United States* v. *Parke, Davis & Co.*, 28 U.S.L. WEEK 4150, 4159 (U.S. March 1, 1960), it is surely the emptiest of formalisms to profess to follow this Court's *A.T.A.* decision, while eviscerating it in application.

The Commission has held, on numerous occasions, that a shipper's preference for the services of a given carrier

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[7] In addition to the language from this Court's decision in the *A.T.A.* case quoted by the Commission, the following appears to us to be equally pertinent here: "We find no indications that the Commission has permitted the §207 proceedings in this case to be used as a device to evade §5(2)(b) restrictions. * * * Finally, if under our interpretation a 'loophole' exists in the Act, the Commission has shown no inclination to permit its use as such. Should the Commission prove to be less stringent in the future, appellants not only have recourse to the Congress, but also to the courts for review of the Commission's finding that 'special circumstances' exist." 355 U.S. 152. It is precisely because we believe the Commission has allowed the §209 proceedings here to be used as "a device to evade §5(2)(b) restrictions" that this suit was instituted.

does not justify a grant of authority. It has likewise held, in one of its leading cases in this field, that a rail applicant has a special burden, not assumed by independent carriers, which must be met before it can be granted motor-carrier authority. This special burden was not satisfied by the Commission's conclusion that the rail-subsidiary applicant had met the requirements of Section 209(b) of the Act, since that merely states the requirements for authorizing the performance of contract carriage by independent motor carriers. Under this Court's recently announced decision in *American Trucking Associations, Inc.* v. *United States, supra,* the applicant was required to go further and establish "special circumstances" justifying such a grant. That it did not do so is clearly shown by the Commission's finding that the record before it reflected the absence of any "unusual conditions." Thus the Commission's award of authority under the circumstances of this case flouts Congressional policy and ignores its own precedent cases. In addition, it violates the mandate of the National Transportation Policy requiring fair and impartial treatment of the various modes of transport by establishing a far more lenient standard for rail-owned motor carriers than for their independent competitors, though the statute plainly calls for exactly opposite treatment.

2. The finding of the District Court that various evidentiary matters going to past handling of General Motors' traffic by PMT, the physical layout of GMC-PMT facilities, the claimed need for the extension of PMT's service, and GM's steadfast refusal to do business with any of the independent motor-carrier protestants, constituted "substantial evidence of special circumstances" (170 F. Supp. 45; R. 81), merely quarrels with the contrary conclusion reached by the Commission. Nowhere in its opinion did the District Court spell out, or even intimate, the basis for its disagreement with the Commission's conclusion. Under long-familiar holdings of

this Court, a reviewing court may not substitute its judgment for that of the Commission unless the latter's findings are clearly erroneous. Since the opinion of the court below in no way discloses that the Commission's finding of an absence of any "unusual conditions" was unsupported by the record, its contrary finding of "special circumstances" may not stand.

3. The intimation in the District Court's opinion (170 F. Supp. 44; R. 79) that the recent amendment to Section 209(b) of the Act has a bearing on the issues here is, we submit, erroneous. The clearly expressed purpose of the statutory change was to overcome this Court's decision in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409. Manifestly, there was no intent to repeal by implication the Congressional policy against unrestricted truck service performed by railroads or the many court and Commission decisions requiring rail applicants for such authority to satisfy a special burden not required of independent motor carriers.

4. The authority granted the rail subsidiary to perform dual operations as both a motor common and contract carrier, while at the same time its rail parent provides service to the same shipper, as well as its competitors, violates the requirements of Section 210 of the Interstate Commerce Act. That section requires that dual authority may not be granted unless, "for good cause shown," the Commission finds that the holding of such dual authority is consistent with the public interest and the National Transportation Policy.

The Commission, in interpreting the language of Section 210, has often held that the mere opportunity to engage in discriminatory practices is sufficient to warrant disapproval of dual operations. Yet here, where the opportunity for such practices is greatly enhanced by the service of the railroad being added to the dual service of its motor subsidiary—a factor not present when the

applicant is an independent motor carrier—the Commission has completely ignored the statutory requirement that it may not grant dual authority except "for good cause shown." Whatever quantum of proof is required in individual cases, the fact must surely be that *some* evidence is required in order to invoke the statutory exemption from the bar which otherwise prohibits such operations. Yet here, the rail-subsidiary applicant introduced no testimony whatever to justify its exemption from the prohibition, and the Commission's grant of authority in the report here under attack merely relies on its earlier report in the Sub. 34 case (77 M.C.C. 623; R. 31.) But when the earlier report is examined (71 M.C.C. 564-565; R. 60), it is noted that applicant likewise failed to introduce any evidence there to support a dual authority grant. Not only that, but the Commission took applicant to task for its failure (*Id.*, at 565; R. 60). The Commission's grant of dual authority, being completely without evidentiary support, is arbitrary and capricious and ignores the statutory requirement that applicants for dual authority must show "good cause" to justify its issuance.

5. The holding of a majority of the court below that plaintiffs lacked standing to sue to challenge the Commission's order here, is, we respectfully submit, erroneous. The basis for that holding, urged by the intervening defendants, but not the Commission, is the fact that applicant's supporting shipper, General Motors, insisted that it would give none of its business to any of the independent motor protestants. This attitude of General Motors was not based on any feeling that the protestants were not capable of rendering a satisfactory service, but rather that they were somehow "tainted" since they had performed service for Ford, Chrysler, and other GM competitors. As previously noted, the Commission has often refused to let the preference of a supporting carrier dictate its decision in application cases such as this.

Its decision here thus establishes one set of rules for ordinary, run-of-the-mill, shippers and the independent motor carriers which desire to serve them, and another, much more favorable, for the very large and important shipper and its favored, rail-owned carrier whom it chose to support.

In addition, the ultimate result of the decision of the majority below, if upheld, will make it impossible to ever obtain court review of Commission decisions in application cases. If the argument accepted as valid by the majority prevails, every shipper which supports a carrier's application before the Commission will stoutly insist—as did General Motors here—that no protestant will get any of its business in any event. Thus, no protestant will be damaged in the legal sense[8] if the Commission grants the application, no matter how flimsy the proof of need for service. In this manner the majority below, in holding that protestant carriers before the Commission lacked standing to seek court review of its order, has effectively snuffed out a right specifically conferred by Congress.

ARGUMENT

The Commission's Report and Order Violates Congressional Policy And This Court's Decisions Dealing With Rail Operation of Motor Vehicles.

Underlying Congressional Policy

This Court has dealt so often and so recently with the Congressional policy expressed by the proviso of Section

[8] The logic of the holding is disarmingly simple. Since protestants have no chance of ever transporting G.M. traffic, they can lose no revenue in any event. Having suffered no damages, there is no basis for them to seek review of the Commission's order. The basic fallacy of this logic, aside from its legal frailty, is the failure to recognize that even General Motors can change its mind (and its policy) tomorrow, no matter what it says today.

5(2)(b) of the Interstate Commerce Act that we will not attempt here a detailed discussion thereof.

Congress adopted an anti-monopoly policy with respect to regulated transportation long before it chose to subject interstate carriage by motor vehicle to federal law. The Panama Canal Act of 1912 prohibited any railroad from having "any interest whatsoever . . . in any common carrier by water operated through the Panama Canal or elsewhere" with which the railroad "does or may compete for traffic." 37 Stat. 566, 49 U.S.C. §5(14). Another provision of the same Act, 49 U.S.C. §5(16), allowed rail ownership or control of water carriers, not operated through the Canal, upon a finding by the Commission that such rail ownership or control "will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration." Shortly after passage of the Panama Canal Act, various railroads owning or financially interested in Great Lakes water carriers filed petitions seeking the right to continue the relationship. In *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 716 (1915) the Interstate Commerce Commission roundly denounced the rail applicants and summarily denied their petitions, saying:

> These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against

possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

No doubt, Congress had in mind the success of the railroads prior to the Panama Canal Act in reducing water competition to impotency when, in enacting the Transportation Act of 1920, it declared it to "be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." 44 Stat. 499, 49 U.S.C. §142.

When it enacted legislation regulating interstate motor transportation, Congress took pains to prevent rail domination of that form of transportation. By Section 213 of the Motor Carrier Act, 1935 (now Section 5(2)(b) of the Interstate Commerce Act) the Commission was authorized to approve the acquisition of control of a motor carrier by another such carrier upon a finding, after hearing, that "the transaction proposed will be consistent with the public interest." However, should the applicant for Commission approval be "a carrier other than a motor carrier," the Commission was precluded from acting favorably thereon unless the proposed transaction met the following three requirements:

1) It would "promote the public interest";

2) It would enable the acquiring carrier "to use service by motor vehicle to public advantage in its operations"; and

3) It would "not unduly restrain competition."

The purpose of these added findings, prerequisite to Commission approval of rail acquisitions of motor carriers, as explained by Chairman Sadowski of the Subcommittee of the House Committee on Interstate and Foreign Commerce was to assure that "control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation." 79 Cong. Rec. 12206, July 31, 1935. In short, as stated by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, it was expected that "with this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect against the monopolization of highway carriage by rail, express, or other interests." 79 Cong. Rec. 5655, April 15, 1935.

By the Transportation Act of 1940, 54 Stat. 898, Congress removed any bar to the acquisition of a motor carrier by a water carrier,[9] but continued in full force the restriction against rail operation of motor vehicles, except under the special standards referred to. Here, we submit, was specific Congressional recognition that while there was no danger that water carriers would be able to gain control of the motor-carrier industry, there was no basis for a similar assumption with respect to the vastly larger and financially-powerful railroad industry.

Interpretation of the Congressional Policy

The landmark Commission decision in the field here involved is *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936). That case involved an

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[9] By changing the application of the proviso of §213 of the Motor Carrier Act, 1935, as originally enacted, from "a carrier other than a motor carrier" to "a carrier by railroad" as now specified in §5(2)(b) of the Interstate Commerce Act.

application by a rail subsidiary to purchase the operating rights of an independent motor carrier in order to render a dual service, on the one hand fully coordinated with, and on the other hand completely divorced from, the service of the rail parent. The Commission, division 5, observed, 1 M.C.C. 109, that "It is the obvious intent of the Act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation, and no doubt railroads were particularly in mind." It went on to say, 1 M.C.C. 111-112:

> • • • we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

And, at 1 M.C.C. 113, the Commission held that rail operation of motor vehicles must be "confined to service auxiliary and supplementary to that performed by the . . . [railroad] in its rail operations and in territory parallel and adjacent to its rail lines." In a report and order supplementing its original *Barker* decision, the Commission noted, 5 M.C.C. 9, 11, that ". . . it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions." It then went on to say, *Id.*, 11-12:

> Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, *or which invade to a substantial degree a territory already adequately served by another rail carrier.* (Emphasis supplied)

It may be doubted whether Congress, in protecting the motor-carrier industry from undue rail incursion, was, at the same time seeking to prevent the railroads from, as the Commission put it, "invading" each other's territory. Nevertheless, so long as the Commission followed its interpretation of the Congressional policy as set forth in *Barker,* the rail-protective policy also there enunciated could not harm the motor carriers. But here, ironically, the Commission has entirely abandoned Congress' purpose—to protect the motor carriers from rail performance of unrestricted motor service—while at the same time protecting the rail protestants before it by refusing to allow the rail-subsidiary applicant to "invade" their territory. This, despite the fact that both PMT and GM contended before the Commission that rail service to points beyond the Southern Pacific's rail lines, requiring interchange with rail protestants, was inferior to the motor service sought.

While the express limitations upon rail performance of truck transportation, contained in Section 213 of the Motor Carrier Act, 1935, were not repeated in Sections 207 and 209 of the Act, governing the issuance of certificates of public convenience and necessity to common carriers and permits to contract carriers, respectively, the Commission, in *Kansas City Southern Transport Co., Common Carrier Application,* 10 M.C.C. 221, (1938) held that the principles and criteria laid down in the *Barker* case, *supra,* as being applicable to acquisition proceedings under Section 213, were equally applicable to proceedings

under Section 207.[10] In that case the rail affiliate sought under Section 207 motor common carrier rights to operate partly in auxiliary and supplemental service and partly in independent service. The Commission, Division 5, after discussing the *Barker* decision, determined that only coordinated rail-motor operations should be authorized, subject to five conditions intended to insure that service would remain auxiliary and supplemental to the train service of the railroad.[11] The Commission's decision in the *Kansas City Southern* case has been followed consistently prior to this case.

In 1951, this Court, in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, at 427, tersely and lucidly summarized the Commission's interpretation of the policy limiting rail operation of motor vehicles to so-called auxiliary and supplemental service:

> The Commission understands the Declaration of Policy, §202(a) of the Motor Carrier Act, enacted at

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[10] As previously noted, p. 6, *infra*, fn., the Commission's report concedes that "the same principle" applies whether a rail applicant seeks motor common carrier authority under §207 or contract rights under §209.

[11] 1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Kansas City Southern Railway Company or the Arkansas Western Railway, hereinafter called the railways.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railways.

3. Shipments transported by applicant shall be limited to those which it receives from or delivers to either one of the railways under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

4. All contractual arrangements between applicant and the railways shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service. [10 M.C.C. 240.]

> the inception of federal regulation of motor carriers in 1935, 49 Stat. 543, 49 U.S.C.A. §302, as directing it to preserve the inherent advantages of such transportation in the public interest. It finds support for this view in the National Transportation Policy set out in the 1940 amendments to the Interstate Commerce Act, 54 Stat. 899, declaring that the Act should be administered so as to recognize and preserve the inherent advantages of rail, motor and water transportation. It treats §213 of the Motor Carrier Act of 1935 and present §5 of the Interstate Commerce Act as authorizing mergers, consolidations and acquisitions between rail and motor carriers only within the Transportation Policy. Although §207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating rights, such as appears in the proviso in former §213 and present §5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into §207 in order to preserve the inherent advantages of motor-carrier service.

And in approving the Commission's imposition of restrictions designed to limit the motor operations of railroads or rail-affiliates to auxiliary and supplemental service, this Court observed, *Id.*, at 443-444:

> Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. *The announced transportation policy of Congress did not permit such development.* (Emphasis supplied)

This Court's most recent pronouncement in the field involved is its opinion in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141 (1957). Although the Court there upheld a grant of unrestricted motor authority to a rail affiliate, the sole basis therefor was the Commission's finding, confirmed by the opinions of

the District Court and this Court, of "exceptional circumstances," i.e., the failure of the independent motor-carrier protestants to render adequate service in the area involved. To quote the Commission's report in the proceeding before it, *Rock Island Motor Transit Co., Common Carrier Application*, 63 M.C.C. 91, 103-104:

> Applicant is the only carrier that for a considerable number of years has maintained daily (generally at least 5 days a week) scheduled peddle operations over the entire White Line and Frederickson Line routes regardless of the volume of traffic available for movement in such operations. Opposing motor carriers with appropriate authority have not provided such a service, except with respect to selected small segments of the routes, principally immediately east of Des Moines. These carriers prior to August 30, 1951, delivered less-than-truckload freight to Motor Transit for movement to destinations they are authorized to serve. Some of this freight consisted of low-rated articles which such carriers deemed unprofitable to handle. These carriers in many instances refused to accept less-than-truckload shipments from their motor-carrier connections for movement to a destination embraced in their operating authority. As a result thereof, several of these connecting carriers have had to rely upon Motor Transit to accept and make delivery of such shipments, even in cases where the delivering carrier was designated by the shipper. These experiences have convinced some of the connecting carriers that the unrestricted services of Motor Transit should continue to be available to them so that they may have a carrier that is always willing and able to accept interchange shipments destined to points on the White Line and Frederickson Line routes. One motor carrier that possesses rights on U. S. Highway 6 between Davenport and Des Moines, elects to give all of its less-than-truckload freight to Motor Transit for delivery at such points, because it is not profitable for it to provide this service.

The Commission's report and order in the *Rock Island* case was upheld by a three-judge court for the District

of Columbia, in *American Trucking Associations, Inc.* v. *United States*, 144 F. Supp. 365. The District Court noted, *Id.*, at 367:

> Certainly the terms of the requirement as to auxiliary and supplementary [12] service do not appear in Section 207(a). It is equally certain that the policy of the requirement, being a basic policy in the statute, does apply. The difference between a rigid requirement and an applicable policy is one of flexibility and permits the Commission to be governed *in exceptional circumstances* by the needs of the public convenience and necessity. (Emphasis supplied)

The District Court went on to point out, *Id.*, at 368, that the Commission had found that the "peddle operation" involved, standing alone, "is not a profitable one and that the trend of motor carriers operating in Iowa has been to refrain from rendering this service; * * *." The Court concluded that "the result of sustaining the motor carriers' position would be a privilege to them of giving the service now rendered by Motor Transit if they so desire and refusing to give it when it is economically not feasible. That would not appear to serve the public interest."

On appeal, the District Court's decision was upheld. This Court also stressed the failure of the independent motor carriers to render adequate service (355 U.S. 153):

> There was evidence of a serious need for less-than-truckload peddle service: other carriers frequently failed to handle such traffic, and gave service inferior to that of Motor Transit when they did operate. There was testimony that the weight and key point limitations operated to make even the Motor Transit service less than adequate. It appeared that the peddle traffic alone was not profitable, and that if

[12] At the same page of its opinion, the Court stated: "It is agreed that the requirement [of §5(2)(b)] that the service be used in the operation of the railroad applicant means that the service must be auxiliary or supplementary to the rail service."

> confined to it Motor Transit could no longer render the caliber of peddle service it had maintained prior to the imposition of the temporary restrictions. Further, there was evidence that 11 points would be totally without peddle service if the auxiliary and supplemental restrictions were applied. Apart from the effect of restricted operations on peddle service, the record indicates that other carriers sometimes had been reluctant to accept even truckloads in certain low-rated commodities.
>
> This evidence leaves us unwilling to suggest that public convenience and necessity could only be advanced by confining Motor Transit to service of the smaller communities, while leaving the more profitable business to others.

It is thus clear that the sole basis for upholding the grant of unrestricted authority to the rail subsidiary in the *A.T.A.* case was the existence of exceptional circumstances represented by the failure of the independent motor-carrier protestants to render adequate service in the territory involved. The Commission, in its underlying *Rock Island* report indicated that it was not departing from its long-followed policy of limiting rail operation of motor vehicles to auxiliary and supplemental service. After discussing the *Kansas City S. Transport Co.* case, and the five restrictions there imposed,[13] 63 M.C.C. 101-102, the Commission concluded, at 102:

> The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. *This policy was and is sound* and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and

[13] Set forth in fn. 11, p. 17, *supra*.

(2) that the public interest requires the proposed operation, *which the authorized independent motor carriers have not furnished, except where it suited their convenience.* (Emphasis supplied)

And the Commission concluded, *Id.*, at 108:

> The findings hereinafter made are not to be construed as an abrogation of the policy established in *Kansas City S. Transport Co., Inc., Com. Car. Application, supra.* They represent an exception to that policy justified by the evidence in this proceeding. In other words, such findings do not establish a precedent. Each case of this character must be determined upon the facts and circumstances disclosed by the evidence.

Commission's Decision Violates Settled Construction

There is a striking contrast between the record before the Commission in the case under review, and that held to justify a grant of unrestricted authority in the *A.T.A.* case. Here, the protestant motor carriers—far from being reluctant to serve—are anxious to do business with the supporting shipper, General Motors Corporation, but that organization, for reasons entirely unrelated to their ability to provide adequate service, shuns them. We have outlined, in Appendix B, the testimony of the appellant motor carriers dealing with this aspect of the case. Their testimony, summarized, indicates that they are well-established carriers; have engaged in the business of transporting motor vehicles for many years; operate equipment suitable for the transportation of GM vehicles; have (or are willing and able to establish) terminals in the immediate vicinity of GM's plants; consider GM traffic very desirable and are able and willing to make the necessary expenditures to add to their fleets and terminal facilities to the extent necessary to handle GM traffic; in the aggregate they can provide substantially all the service needed and are willing to apply for any additional authority required. There can be no doubt of

the willingness and ability of the independent motor carriers to provide the service which General Motors desires. The Commission's report, in dealing with the Sub. 36 application, notes (77 M.C.C. 614; R. 20):

> Exceptants are authorized to conduct the proposed operations, have equipment suitable for the transportation of the shipper's vehicles, and are experienced in transporting the considered commodities.

A more detailed outline of the authority of the appellant motor carriers is set forth (R. 24-26) in the Commission's discussion of the Sub. 37 case.[14]

The shipper here—unlike those in the *A.T.A.* case—has not tried to obtain service from the independent carriers and been rebuffed. Rather, as noted by Commissioner Murphy, dissenting (77 M.C.C. 627; R. 36), it has adamantly refused to use their services. At the hearing before the Commission, the General Motors witnesses made it clear that they had no intention of using the services of existing motor carriers, no matter how adequate.[15]

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[14] In addition to the authority held by protestants (appellants here), the Commission's report notes (77 M.C.C. 619; R. 26), that nearly five months before its report and order under review was issued, Insured Transporters received authority to transport automobiles from GM's Oakland plants to points in Arizona, California, Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming. Insured Transporters was an "intervener in opposition" in the Sub. 34 case and an "intervener as its interests might appear" in the Sub. 35, 36 and 37 cases before the Commission.

[15] In our reply to the motions to affirm filed by appellees, we pointed out (pp. 6-7) that the Commission has recently told GM's Cadillac Division to use the services of existing carriers, rather than seek new service. As noted, however, that case (*Boutell Driveaway Co., Inc., Ext.—Cadillacs and Buicks*, ____ M.C.C. ____; April 10, 1959) involved a situation in which GM's Cadillac Division did not object to using the service of a carrier "merely because it also serves its competitors." Quaere: May the Commission tailor its interpretation of the law and the important Congressional policy involved to suit the varying attitudes of shippers, as it has done in the cited case and the instant proceeding?

The Traffic Director of the Chevrolet Motor Division stated that he was not interested in common carriers (R. 226, 236), wants only single-line contract carrier service (R. 231), is not familiar with the service of existing carriers (R. 235), and has made no investigation, or received information from his subordinates, respecting the service offered by the independent carriers. R. 237. He said much more in a similar vein, but his whole attitude is perhaps best summarized by the following colloquy (R. 246):

> Q. So it's your position that existing carriers shouldn't be offered the opportunity to serve you, but that a carrier who doesn't have authority, that you want to have authority, that that carrier should be granted that authority?
>
> A. Yes, that is our position.

The Traffic Manager of the Buick-Oldsmobile-Pontiac Assembly Division of General Motors testified in the same fashion. He stated that he wasn't "sufficiently interested" to make any investigation with respect to the services of existing motor carriers, notwithstanding the fact that GM dealers have complained of the lack of truckaway service for the last two years. R. 290-291. He also stated that he would not use the services of any of the protestants even if the rail subsidiary's application was denied. R. 295.

> Q. And you make that observation without knowing what they have, what they offer, their facilities or their territory?
>
> A. That is correct. R. 296.

The Commission, in one of the fundamental decisions in this field, *Rock Island Motor Transit Co.—Purchase—White Line*, 40 M.C.C. 457, 474, stated:

> • • • a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public conveni-

> ence and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified.

This Court, in its *Rock Island* opinion, at 340 U.S. 428, quoted the above language as indicating the Commission's purpose to apply the National Transportation Policy so as "to preserve the inherent advantages of motor-carrier service." In its *A.T.A.* opinion, at 355 U.S. 151, this Court noted its earlier reference to the quoted language. Thus it appears that although this Court has indicated that the Commission's expression properly interprets the law, the Commission's majority has consigned it to limbo. Surely the mere application by the rail subsidiary, together with the backing of the supporting shipper, cannot be said to meet the "special burden" imposed on railroads or their affiliates seeking unrestricted motor-carrier rights. That it has not met its special burden is clearly indicated by the following from the report of the Commission (77 M.C.C. 620; R. 27):

> Shipper's argument that motor service is needed to nonrail points to meet the competition of other automobile producers can be accorded little probative weight in face of its continued refusal to make use of the available services of the protesting motor carriers. The fact that both General Motors and applicant have cooperated to permit the latter to establish receiving yards adjoining the former's assembly plants and thereby to block the use by other carriers of normal egress routes, has no bearing upon the adequacy or inadequacy of existing motor transportation facilities.

We have shown that the Commission's grant of authority, unlike that involved in the *A.T.A.* case, is not justified by any failure on the part of independent motor

carriers. In the final analysis, the award seems to have been made merely because the supporting shipper, GM's Chevrolet Division, insisted that the rail-subsidiary applicant be so favored. But if one principle is firmly rooted in transportation law, it is, as indicated by Commissioner Murphy, dissenting (77 M.C.C. 627; R. 36), that the preference of a shipper for the services of a particular carrier does not justify a grant of authority. The Commission has so held on numerous occasions. See, for example, *Nygard Express, Inc., Contract Carrier Application*, 69 M.C.C. 340, 342 (1957), and *Gray Contract Carrier Application*, 69 M.C.C. 695, 704 (1957). The Commission has rendered similar decisions subsequent to its report and order here involved. In No. MC-113855 (Sub-No. 32); *International Transport, Inc., Extension—Winona, Minn.* (decided Nov. 17, 1959; mimeo., not yet printed), the Commission, division 1, said (Sheet 8):

> It is apparent, therefore, that the supporting shipper has available to it, in addition to the coverage presently afforded by applicant, an abundance of common-carrier service [16] suitable for the transportation of its products. The commodities involved presently move by rail and motor carrier. Some of these products are transported by applicant and certain of the opposing carriers either direct or through interlining. *Moreover, the shipper has made no attempt to utilize much of the service available to it, and its support of the application appears to stem primarily from a desire to use the services of this particular applicant and not from any real substantial need for additional motor-carrier service.* It is well established that a shipper's preference for a particular carrier does not provide a proper basis for the granting of authority for a new competitive serv-

[16] The carrier appellants here include both common and contract carriers. Convoy, Robertson, Western and Kenosha are common carriers, while Hadley and B & H are contract carriers. Insured Transporters, referred to in fn. 14, p. 23, *supra*, is a common carrier. 77 M.C.C. 617-619; R. 24-26.

> ice, particularly where, as here, there are a number of carriers available that offer a service similar to that proposed, including the drop-off of shipments en route. (Emphasis suppied)

And in No. MC-36144 (Sub-No. 5), *Law & Ingram Transp. Co., Inc., Extension—Pig Iron* (decided December 18, 1959; mimeo, not yet printed), the Commission, reversing on reconsideration an earlier grant of authority to applicant, stated (Sh. 4):

> In our opinion, the prior report failed to give sufficient weight to motor-carrier protestants' expressed willingness to perform the proposed service. It is well established that an existing carrier generally should have the right to transport all the traffic it can handle adequately and efficiently in the territory it is authorized to serve, without the added competition of a new operation. The evidence in support of the application establishes an understandable preference of the supporting shipper to have applicants' present service extended to new points, but it does not establish that a public need exists therefor. • • •

It thus becomes clear that the Commission not only did not require the rail-subsidiary applicant to meet the "special burden" which it asserted in the *White Line* case all such carriers must shoulder—it did not even require it to meet the burden contemporaneously imposed upon independent motor carriers! We turn now to the reasons claimed to justify such treatment.

After assuring the rail protestants that they would be protected by limiting the authority granted to their rail-competitor subsidiary to points on its parent's lines, the Commission offers the following comfort to the motor protestants, 77 M.C.C. 620; R. 27:

> On the other hand, insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by the Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier.

In view of the fundamental Congressional policy involved, the Commission's reasoning is both logically and legally fallacious. If PMT is to be turned loose to perform unrestricted truck service merely because its rail parent already transports the same traffic in rail service, then every railroad in the country is free to pick its choicest traffic and largest shippers and enter the field of motor carriage with respect thereto. The Pennsylvania Railroad, we have no doubt, has transported iron and steel products from United States Steel plants for decades. If the Commission's reasoning is valid, the Pennsylvania could tomorrow ask for and receive motor carrier authority to handle iron and steel products for U.S. Steel between points throughout its vast system. Multiply that example by the number of railroads in the country and some idea can be reached of the extent of motor-carrier authority which railroads could obtain merely for the asking. What then becomes of the Congressional policy against allowing unrestricted truck operations by railroads except in exceptional circumstances?

The independent motor carrier industry has genuine reason to fear a great spread of the practice of authorizing unrestricted motor service by railroads or their affiliates, if the instant grant to PMT is upheld. To illustrate: numerous applications have been recently filed by rail motor subsidiaries and independent motor carriers to transport cement from producing plants in the Lehigh Valley, which, until now, have used rail service exclusively. Docket No. MC-27817 (Sub-No. 35); *H. C. Gabler, Inc., Extension—Cement From Maryland and Pennsylvania Counties.* In their brief filed October 1, 1959, the Pennsylvania Railroad and its wholly-owned subsidiary, Pennsylvania Truck Lines (PTL), one of the applicants, after discussing the "policy of restricting the motor carrier operations of the railroads," go on to say (pp. 23-24):

> Here the public interest requires the relaxation of the policy and issuance of the authority sought [by PTL]. PTL is not going to provide competition for existing motor carrier services for none of the existing motor carriers are presently handling the cement traffic. Rather PTL is seeking for the Railroad opportunity to meet the competition of motor carriers entering the field for the express purpose of diverting the Railroad's traffic. The Commission in a situation strikingly similar, has issued contract carrier permits to a subsidiary of the Southern Pacific Railroad so that it could remain competitive for automobile traffic it had been handling in box cars. *Pacific Motor Trucking Co.—Ext.—Oregon*, 77 M.C.C. 605 (1958) aff. *American Trucking Associations* v. *United States*, 170 F. Supp. 38 (D. of C. 1959). If a railroad subsidiary is entitled to an unrestricted permit to enable the railroad parent to continue to compete for automobile traffic, PTL's applications should likewise be granted so that the Pennsylvania Railroad will remain competitive for the very important cement traffic.

The above-quoted portion of the railroad's brief in the cited case indicates that if the Commission may validly grant unrestricted rights to PMT under the circumstances of this case, it can with equal validity grant similar authority to other railroads throughout the country, despite the Congressional policy against such grants except in exceptional circumstances. Beyond that, it is interesting, at least, to note that its sister rail-motor combine refers to the grant of authority to the rail subsidiary here as an "unrestricted permit." Coincidentally, despite the fact that there has been no intervening change of Congressional intent, we find the same railroad subsidiary which was instrumental in establishing, through its application there involved, the *Barker* doctrine, now urging the Commission to abandon it on the strength of its PMT report and order.

The Commission's report indicates that had PMT sought common, rather than contract carrier authority,

any grant issued would have included the usual restrictions designed to limit operations to auxiliary and supplemental service.[17] But, the Commission says, these restrictions cannot be here imposed, because that would result in authorizing common carriage, rather than the contract rights applied for. 77 M.C.C. 623; R. 31. In short, all that rail applicants need do, in order to avoid the application of the Congressional policy otherwise applicable where, as here, they cannot show "exceptional circumstances" justifying unrestricted rights, is seek contract rather than common carrier authority. Surely such an important Congressional policy may not be so easily frustrated!

The Commission's report, 77 M.C.C. 623; R. 31, partially justifies its failure to impose the usual rail-motor restrictions on the operations authorized, "for to do so would be to command the holder to render a common-carrier service." In the same breath, 77 M.C.C. 622-623; R. 30, it refers to two of its own decisions, the *Hagerty* and *Siebert* cases, where it did just that! In numerous other cases, the Commission has issued a different type of authority than that applied for. For example, in *Pregler Extension of Operations*, 23 M.C.C. 691; *Newkirk Contract Carrier Application*, 43 M.C.C. 85; *Gay Contract Carrier Application*, 73 M.C.C. 660; *Fuller Contract Carrier Application*, 73 M.C.C. 716; *Coleine and Cortazzo Contract Carrier Application*, 76 M.C.C. 70; and *Smetanick Extension—Clay Products*, 77 M.C.C. 523, the Commission authorized the performance of common carrier service although contract carrier rights were applied for. For the reverse situation, see *H. & M. Trucking Co., Inc., Common Carrier Application*, 72 M.C.C. 389, rev'd. on

[17] The report does not so state specifically, but we believe this a fair inference from the tenor of the whole report, particularly the discussion under the head "General Discussion—Restrictions," 77 M.C.C. 621-623 (R. 28-31), plus the finding, *Id.*, 628 (R. 31), of an "absence of any showing of unusual conditions."

other grounds, 74 M.C.C. 107; and *Michigan Pickle Co. Common Carrier Application—Passengers*, 77 M.C.C. 544.

In the proceedings under review, as alternatives to the result reached, the Commission had two choices: (1) outright denial of the applications or (2) a grant of common carrier authority.[18] This latter alternative, of course, would clearly have enabled the Commission to give life to the Congressional policy by attaching conditions designed to limit the service to auxiliary and supplemental operations, tieing in with the rail parent's common carrier service from the GM plants involved. Instead, the Commission chose to issue unrestricted authority, despite its finding of an absence of special circumstances which would justify such a grant.[19] And, as previously noted, in bowing to the supporting shipper's stubborn demand for PMT's service, it pointedly ignored its many decisions holding that such preference does not justify a grant of authority.

Finally on this phase of the case, we anticipate that appellees will argue, as they did before the District Court, that the authority granted to the rail subsidiary was not "unrestricted," as we contend. The short answer to this

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[18] The Commission has recognized that there is little distinction between motor common and contract carriage of automobiles. In *Bush Construction Co., Inc.* v. *Platten*, 48 M.C.C. 155, 162, the Commission, division 2, stated: "And the operations of many common carriers are limited to particular shippers or shippers of a particular class, not by reason of the desires or whims of the carriers, but because the nature of the commodity or commodities transported necessarily narrows the scope of the public holding out. For example, *common carriers of automobiles in initial movements of necessity serve an extremely limited class of shippers.*" (Emphasis supplied)

[19] Ironically, and paradoxically, the Commission's rationale for issuing the unrestricted authority involved, specifically points out that its previous grants of such authority to railroads or their affiliates were "warranted by special circumstances." 77 M.C.C. 622, R. 30.

is that both the majority and dissenting opinions clearly indicate that all members of the Commission understood that the authority issued was, in fact, unrestricted. To be sure, the majority report (77 M.C.C. 623; R. 31) imposes a "territorial limitation" on the service to points on the rail parent's line,[20] and also notes that "a restriction is warranted" reserving the right to impose, in the future, any restrictions necessary or desirable. At the outset of his dissent (77 M.C.C. 627; R. 36) Commissioner Murphy properly characterizes the grant of authority to PMT as "unrestricted."

It should be obvious that a mere reservation of power to impose in the future, if ever, restrictions on the authority here involved, can in no proper sense be termed a "restriction," *as of now*. In any event, the utter futility of this reservation is demonstrated by the Commission's report itself. If, as it states (77 M.C.C. 623; R. 31), the "restrictions usually employed to apply to substituted motor-for-rail service could not be imposed in a permit, for to do so would be to command the holder to render a common carrier service," how could such restrictions be imposed in the future any more readily or properly than at present?

This leaves only the question of whether the "territorial limitation" involved constitutes a "restriction" as that term is ordinarily comprehended. In their motions to dismiss appellees contend that it does. PMT and General Motors say, at pp. 5-6 of their motion, that the "basic flaw" in our argument is our description of the rights as "unrestricted." The Commission, at page 9 of its motion, contends that "the anti-monopoly objectives of Section 5(2)(b) are satisfied by restricting the service to

[20] The only effect of which, as noted by Commissioner Arpaia, dissenting (77 M.C.C. 627; R. 36), is to protect "rail protestants against invasion and competition" but which fails "to extend protection to the motor carrier protestants."

points which are already served by the railroad . . ." These contentions, though phrased differently, amount to the same thing: that the Commission, by geographically or territorially limiting the authority granted,[21] has conformed to the Congressional policy applicable in cases of this kind. In our Jurisdictional Statement (pp. 15-16) we pointed out the absurdity of this contention. Every application for motor-carrier authority before the Commission involves some territorial limitation and such a "restriction" cannot be construed as limiting the operations here involved to service which is auxiliary and supplemental to that of PMT's rail parent.

More than a decade ago, appellees' contention was rejected by the Commission, in the *White Line* case, *supra*, 40 M.C.C. 457. There (at p. 470) the Commission noted that "there also appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might be rendered by a railroad or its affiliate under any acquired right." (Emphasis by the Commission) In a somewhat lengthy discussion (pp. 471-472), the Commission completely disposed of the contention that territorial limitation of a rail affiliate's motor authority satisfies the Congressional policy underlying Section 5(2)(b). For brevity, we quote the opening sentence and concluding paragraph of the discussion:

> Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only terri-

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[21] The Southern Pacific's rail system extends for 8,000 miles in the area involved. *Transport Statistics in the U.S.*, 1957 (I.C.C.), Part 1, p. 403. Appellees PMT and General Motors characterize the vast increase over the insignificant interstate contract carrier authority previously authorized as a "relatively minor extension." (Motion to Affirm, p. 20).

torially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied.

In these circumstances and contrasting the language used and the supporting discussion with the much simpler language which would have been adequate if it had been intended to restrict future operations of the vendee only territorially, *it is clear that any tendency to treat the Barker case as an approval of future rail-motor operations which should be unrestricted except territorially, ignores the clear declaration that certain types of operations are disapproved wherever conducted, and must spring from a misinterpretation of the intent of the reports therein.* (Emphasis supplied)

Even if the Commission had not so clearly rejected the argument that territorial limitation to points on the rail line does not satisfy the Congressional policy involved, the exercise of common logic should do so. The railroads of the country, in the aggregate, serve almost every point of any commercial importance at all. Considering the underlying Congressional policy, it would be a strange result, indeed, if railroads were to be allowed, willy-nilly, to parallel their lines with motor service, operating independently of the rail service as PMT has been allowed to do here. Yet that is the inevitable result once the argument is accepted that a territorial limitation to points on the rail line satisfies the requirement that railroad motor operations, except in exceptional circumstances not present here, are to be limited to so-called auxiliary and supplemental service.

Included in the anti-monopoly objectives of Section 5(2)(b) is the prohibition against entry of an order by the Commission unless it finds that service by motor vehicle will be used "in its [the railroad's] operations." The ability to make such a finding is indispensable to the issuance of bona fide restricted authority. Yet the Com-

mission majority (77 M.C.C. 624-625; R. 33) could make no such finding here, for the obvious reason that the grant of authority does not conform to the requirements of §5(2)(b).

The most persuasive argument against the railroads entering into unrestricted truck operation is the necessity for maintenance of competition among different modes of transportation as the best assurance that the public interest will be protected in respect to rates and service. Here, the result of the decision is to completely stifle any possibility of competition by giving the Southern Pacific a monopolistic control over all rates and service from General Motors Plants on the West Coast and putting the railroad in a position to dominate and control rates on automobiles from other manufacturing plants which it serves on the West Coast. Theoretically, the shipper is being given an alternative of an all-rail service or an all-truck service, but regardless of which choice he makes there is really no competition. One is the left arm and the other is the right arm of the same Goliath to whom the Commission has awarded a complete and permanent victory resulting in immediate annihilation of all competition by independent motor carriers.

It may be argued that if GM is going to be served only by a rail monopoly, why should this be a matter of public concern, since it is a large and powerful shipper able to protect itself. But what about the GM dealers and retail purchasers of GM autos. The transportation cost is paid initially by GM but is passed on to the dealer and then to the retail buyer in the form of additional charges for "transportation and handling". The issue here is not entirely the protection of the independent trucking industry for the sake of that industry itself, but because the competition afforded by that industry is the only protection available to the small businessmen who sell GM cars and the individuals who buy them.

Congress certainly has made it clear that the public is entitled to this protection and that it is guaranteed such protection by the statutory prohibition against rail transportation monopolies. If such protection is to be completely removed, then Congress must do it and not the Commission. Regardless of the shipper's willingness to be allied with a railroad monopoly in the form of both rail and truck transportation from all of its West Coast manufacturing plants, the consequences of this monopoly are eventually borne by the buying public rather than the shipper. Congress indicated a clear intention to protect the public against these consequences and neither the selfish interests of the railroad applicant nor the supporting shipper should transcend the public interest embodied in the underlying Congressional policy involved.

The Court Below Erred in Holding That The Grant Of Unrestricted Authority Was Justified by "Special Circumstances."

As noted, the Commission's report, 77 M.C.C. 623 (R. 31), acknowledges the absence of any "unusual conditions" which would justify an exception to application of the Congressional policy usually applied in cases of this kind. Without in any manner indicating wherein the Commission erred, the court below made a contrary finding, i.e., that "substantial evidence of special circumstances" justified the authority granted. 170 F.Supp. 38, 45; R. 81. This finding by the court below was apparent recognition that under the governing decisions of this Court, the Commission's award of unrestricted rights could not stand absent a finding that "special circumstances" justified it.

One of the most firmly established rules in court review of agency action is that findings of an administrative body may not be overturned unless clearly erroneous. But, as noted, the court below did not even suggest that

the Commission erred in finding no "unusual conditions," much less specify wherein it had erred.

In substituting its judgment for that of the Commission, the District Court exceeded the limits of judicial review of agency action. In such review the court is limited to determining whether errors of law have been committed. *Scripps-Howard Radio* v. *Federal Communications Comm.*, 316 U.S. 4, 10; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139-40; *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144, 145. Weighing the evidence and modifying the Commission's finding that no such "special circumstances" ("unusual conditions") were shown, exceeded the court's reviewing role.

The appellants thus are faced with an affirmation of the Commission's grant of unrestricted authority, but are given no clear-cut statement whether the grant was proper because the "special circumstances" test is not applicable, or because the test was applicable and was met, as the court indicates.

Although a court's power to overturn an agency's findings of fact is ordinarily questioned only in cases where the effect of the court's action is to reverse agency decisions, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88. An administrative order "cannot be upheld unless the grounds upon which the agency acted in exercising its power were those upon which its action can be sustained." *Id.*, at 95. Courts are precluded from inferring findings which would support the agency conclusion. *Id.*, at 88; *Boudin* v. *Dulles*, 235 F.2d 532, 534-35; *Burrell* v. *Martin*, 232 F.2d 33; *a fortiori* they cannot overturn agency findings of fact not

found unsupported by substantial evidence so as to achieve the same results as the agency.

One of the dangers of judicial reevaluation of evidence considered by the agency is that different inferences will be made by agency and court from the same undisputed facts. This is exemplified by the different evaluations of the fact that the rail subsidiary had been permitted to establish receiving facilities at the General Motors plants. As previously noted, p. 25, *supra*, the Commission found that this factor "has no bearing upon the adequacy or inadequacy of existing motor transportation facilities." Considering the same evidence, the court stated the Commission had found

> that use of any other carrier would require outgoing shipments to be dispatched through the shipper's incoming gate, causing confusion and disarranging the operations at the plant, which are geared to use of PMT's services from its nearby yard. 170 F.Supp. 38, 45; R. 80.

The "finding" attributed to the Commission by the court below is apparently based on language in the Commission's report, at 77 M.C.C. 614; R. 20. We submit that this language was not intended by the Commission to be a "finding," [22] but merely a recital of one of the contentions of the rail-subsidiary applicant. But the court below, erroneously characterizing it as a finding, disagreed with the Commission and held it to be part of the substantial evidence of "special circumstances" justifying the unrestricted grant.

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[22] The Commission's language referred to appears in a section of its report entitled "Present and Proposed Operations of Applicant," commencing at 77 M.C.C. 612 (R. 18). Even if the court below was correct in holding this to be a "finding" of the Commission, it is obviously subordinate to its later conclusion, in the same section of its report, that the close proximity of PMT's receiving yards and GM's assembly plants "has no bearing upon the adequacy or inadequacy of existing motor transportation facilities." 77 M.C.C. 620, R. 27.

The "substantial evidence" test set out in section 10 of the Administrative Procedure Act, 49 U.S.C. §1009, is not, as the District Court used it, whether there is substantial evidence to support a conclusion opposite to that determined by the agency, but whether there is substantial evidence to support the agency finding. It may be possible that a case would arise in which substantial evidence of one finding or conclusion would preclude the possibility of there also being substantial evidence of the contrary conclusion or finding. But the court below in no way intimated that the instant proceeding is such a case or that there was an absence of substantial evidence in the record to support the Commission's finding of no "unusual conditions."

The appellants are at least entitled to a clear statement by the court below indicating wherein the Commission erred in finding no "unusual conditions." If the "special circumstances" test applies to unrestricted grants of motor contract authority to railroads or rail affiliates,[23] substantial justice can only be done by reaffirming the limitation on the court's powers on judicial review and voiding this grant of unrestricted authority based on a record held by the Commission to disclose no "unusual conditions."

Aside from the question of limitation upon court review of agency action, we respectfully submit that the court below erred, in any event, in finding "special circumstances" justifying the grant of unrestricted authority. The Court's opinion states, 170 F.Supp. 38, R. 80, that:

a) PMT had given General Motors good service from other points for many years;

b) that operations must be closely coordinated;

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[23] As noted, p. 6, *supra*, the Commission's report concedes that "the same principle" applies to §209 (contract carrier) as to §207 (common carrier) proceedings.

c) that use of any other carrier would cause confusion and disarrange operations at the plant;

d) that GM supported the application in order to obtain [24] better service to meet the competition of other automobile manufacturers, i.e., Ford and Chrysler.

Admitting, *arguendo*, that these findings are correct, it is submitted that they do not justify an exception to the usual rule of limiting rail operation of motor vehicles to auxiliary and supplemental service. If General Motors is in any "predicament," it is one which is brought about by its intentional "backing" of a motor carrier which—as distinguished from a non-rail subsidiary—suffers an inherent disadvantage because of the Congressional policy here involved. It must be assumed that GM was well aware of this when it voluntarily entered into the arrangements which led to close coordination between its operations and those of the rail subsidiary. Since any problems which might accrue to GM by reversal of the Commission's decision would be—unlike the situation in the *A.T.A.* case, *supra*, not traceable to any fault on the part of the independent motor-carrier protestants, but entirely the result of its voluntary exercise of its judgment—why should the Congressional policy usually invoked in cases of this kind not be applied here? To find, as the District Court did, that GM's "problems" arising from its exercise of judgment constitute "special circumstances" simply means, in the final analysis, that any shipper who desires to may frustrate the important Congressional policy here involved by merely choosing to align itself with a railroad's motor subsidiary and so closely coordinating their transportation facilities and

[24] As to this, the Commission said, 77 M.C.C. 620, R. 27: "The shipper's argument that motor service is needed to nonrail points to meet the competition of other automobile producers can be accorded little probative weight in face of its continued refusal to make use of the available services of the protesting motor carriers."

arrangements as to make any disruption thereof inconvenient. There are no equities here which warrant special treatment for General Motors.

The Recent Amendment of Section 209(b) of the Interstate Commerce Act Does Not Support the Commission's Award of Authority to the Rail Subsidiary.

The District Court noted our contention (170 F. Supp. 44; R. 78) that the recent amendment to Section 209(b)[25] has no bearing on the issues here,[26] and went on to hold (*Id.* p. 44; R. 79) that regardless of the original reason for instituting the legislation which culminated in the 1957 amendments, the Commission "did consider those criteria [of §209(b) as amended]" in its report and order here involved. We respectfully submit that the District Court erred in holding that the amendment to §209(b) has any bearing on the issues here.

The primary purpose of the 1957 amendments was to overcome the effect of this Court's decision in *United States* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409, wherein it was held, at 412, that a contract carrier "is free to aggressively search for new business within the limits of his license. In testifying at the hearings on the proposed amendment to the law, Commissioner Clarke, on behalf of the Interstate Commerce Commission, noted that,

> Freedom to solicit customers without restriction as to specialized service would tend to obliterate the

[25] Public Law 85-163, 85th Cong., approved August 22, 1957; 71 Stat. 411.

[26] It was the intervening defendant, PMT, not these appellants, who raised this issue. In its answer to our complaint, PMT contended (p. 4) that the Commission had properly applied "the applicable provisions of section 209(b) of the Interstate Commerce Act, as amended August 22, 1957 * * *". In its reply brief filed in the District Court, PMT's first argument bears the heading "The Amendment to Section 209(b) on August 22, 1957, Has a Direct Bearing on the Present Case."

distinction which Congress intended to make between common and contract carriers. The amendments proposed in the bill [S. 1384] would enable the Commission to give greater effect to congressional purpose, first by amending the definition of contract carrier by motor vehicle to state clearly that the transportation services furnished by such carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers. Hearings on S. 1384 and Related Bills, Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Congress, 1st Sess., April 17, May 7, 8, and 9, 1957, p. 23.

Also testifying during the hearings was David I. Mackie, Chairman of the Eastern Railroad Presidents Conference, who appeared on behalf of the Association of American Railroads, in "support of the general objectives of S. 1384." *Id.*, p. 263. Mr. Mackie stated that "the bill would be tremendously helpful in controlling the enormous growth of contract carriage of the type exemplified in the Contract Steel Carrier case." The witness also expressed the thought that "the general public, as well as the general transportation industry, would be benefitted by the adoption" of the legislation "because the general public is necessarily dependent for its transportation needs mainly upon common carriers, and the health and welfare of the common carriers is accordingly basic to the public welfare, and the unregulated, unbridled growth of highly competitive contract carriage of the nature that this bill would prevent is bad for common carriage, and therefore it is necessarily bad for the public." *Id.*, p. 267.

The report of the Senate Committee which accompanied S. 1384 stated:[27]

> The present law has proved inadequate to maintain proper distinctions between common and contract

[27] S. Rept. No. 703, 85th Cong., 1st Sess., p. 7.

> carriage. It has made difficult in this area of regulation, of obtaining the objectives of the national transportation policy. The decision of the Supreme Court in *United States* v. *Contract Steel Carriers* points out clearly a need for a change in the statute. Without it, proper and sound administration and regulation in the public interest cannot be achieved.

The report of the House Committee on Interstate and Foreign Commerce (H. Rept. No. 970, 85th Cong., 1st Sess.) on the companion bill (H. R. 8825) is to the same effect.

The District Court's holding that the Commission considered the criteria of §209(b) as amended, fails to take into consideration the fact that, in amending the law, Congress gave not the slightest intimation that it in any way intended to alter its traditional policy against rail performance of unrestricted truck service. The rule against repeal by implication is too well known to require citation.

As we pointed out in our Jurisdictional Statement (p. 16), Commission compliance with the provisions of §209 (b) is enough where the applicant is other than a rail subsidiary, but the decision of the court below fails to give appropriate consideration to PMT's status. If all that a railroad or its affiliate need do, in order to acquire rights to perform unrestricted truck service, is introduce the same proof required of an independent motor carrier, what has become of its "special burden" alluded to by the Commission in the *White Line* case, *supra*? Neither the Commission's report nor the District Court's affirmance thereof supplies the answer to that question.

It is thus clear that the amendment to §209(b) has no bearing on the issues here and in no way supports the Commission's award of unrestricted right to the rail affiliate, in view of the latter's failure to meet its special burden of showing exceptional circumstances justifying a grant of such authority.

The Multiple Motor and Rail Operations Permitted by the Commission's Report and Order Violate Congressional Policy Against Dual Operations.

The governing statute (Section 210 of the Interstate Commerce Act, 49 U.S.C. §310; Appendix A, p. 6a, *infra*) prohibits, except for "good cause shown," the holding by the same person, or parties under common control, of a certificate as a motor common carrier and a permit as a motor contract carrier authorizing operation by motor vehicle "over the same route or within the same territory." The Commission also recognized in its prior decision in the Sub. 34 case that the principles underlying this provision of the Interstate Commerce Act are equally applicable to a dual relationship between a contract carrier by motor vehicle and its common carrier rail parent. See p. 48, *infra*.

The Commission's report allows the holding by PMT of both common and contract carrier rights, between points in the same territory, and the holding by Southern Pacific Transport Company (still another motor subsidiary of the same rail parent, operating in another territory) of the certificates heretofore issued to it. 77 M.C.C. 625; R. 33. It also condones by its grants of extended contract carrier authority to PMT, the duality of operations resulting from Southern Pacific's service in the same territory as a rail carrier. Thus, the Commission approves the operations by PMT as a motor contract and common carrier, and Southern Pacific as a rail carrier, upon behalf of the same shipper and within the same territory. Moreover, the opportunity would exist for PMT as a motor contract carrier and Southern Pacific as a rail common carrier to transport the same commodities from the same origins to the same destinations. The authority to conduct the multiple rail and motor operations resulting from the Commission's report and order is completely unsupported by the record, and fails to

conform to the Commission's practice in cases involving independent motor carriers.

In *Ziffrin, Inc., Contract Carrier Application*, 28 M.C.C. 683, the Commission, Division 5, in denying an independent motor carrier authority to conduct dual operations, stated (695-696):

> The common-carrier company is authorized to transport general commodities, with certain exceptions, from or to all of the points which applicant is found to have served on July 1, 1935, and since, except South Bend, Ind., and Aurora, Ill. General commodities include those which we have concluded applicant has been transporting. In view of these facts, the grant of a permit to applicant herein would place in the hands of the same person, as "person" is defined in the Act, authority to conduct operations both as a common and as a contract carrier in respect of the same commodities and between the same points. In dealing with individual carriers, we have uniformly imposed conditions which would prevent any such carrier from conducting operations as both a common and contract carrier, where the operations would be competitive as to commodities and territory. Under applicant's theory, we would be prevented from imposing restrictions herein to prevent competitive common-carrier and contract-carrier operations solely because we are dealing with separate corporations.

Later in its report (28 M.C.C. 698), the Division said:

> The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect of the same commodities and between the same points.

A petition for reconsideration was denied by the entire Commission, 33 M.C.C. 155, and when the case was appealed, the Commission's denial of dual authority was ultimately upheld by this Court, *Ziffrin, Inc.* v. *United States*, 318 U. S. 73.

Only recently, the Commission has expressed the same philosophy in denying contract carrier authority to an independent motor carrier already holding common carrier rights. In No. MC-108449 (Sub-No. 59); *Indianhead Truck Line, Inc., Extension—Service Station Supplies*, ____ M.C.C. ____, mimeo., not yet printed (Oct. 13, 1959), the Commission, division 1, stated (Sheet 10):

> Having found that the proposed operation is contract carriage, there next remains for consideration the issue of dual operations arising under section 210 of the act. That section provides in general that no person shall at the same time hold a certificate as a common carrier and a permit as a contract carrier authorizing operations in the transportation of property within the same territory unless for good cause shown the Commission shall find such dual operations to be consistent with the public interest and the national transportation policy. Applicant is authorized as a bulk petroleum transporter, and the supporting shipper is one of its major customers. A grant of contract carrier authority would enable it to serve the same shipper in a dual capacity and open the door to discriminatory practices against which the prohibition of section 210 of the act is directed. Accordingly, we are convinced that dual operations cannot be approved in the circumstances here presented, and that the application must be denied.

As noted, the underlying basis for Section 210 was the recognition by Congress of the opportunities for discriminatory practices, including rebates,[28] that can be effected through service performed for the same shipper as a contract and common carrier. The mere opportunity to

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[28] That this concern cannot be attributed merely to fears engendered by the transportation practices of an earlier day, is plain. See, for example, *United States* v. *General Motors Corp.*, 226 F. 2d 745 (1955), in which the opinion of the appellate court (CCA 3) discloses that GM received a concession of more than $170,000 for property in the Philadelphia area purchased on its behalf, and conveyed to it, by the B. & O. Railroad.

engage in such practices has been found sufficient in numerous cases to warrant disapproval of dual operations. Stated differently, the Commission has said that the door must be closed to even the possibility of a motor carrier serving the same shipper as a contract and common carrier. *Smith and Melton—Extension—Missouri*, 51 M.C.C. 627; *P. J. Hamill Transfer Co., Extension—St. Louis County*, 51 M.C.C. 641; *Park-Davis Lines, Inc., Contract Carrier Application*, 51 M.C.C. 787.

In *Miller Transport Co., Inc.—Purchase—Storch Trucking Co.*, 57 M.C.C. 208, 214-215, the Commission stated:

> The fact that vendee, as a contract carrier, might serve the shipper on commodities differing from those transported by it as a common carrier would not obviate the possibility of engaging in discriminatory practices. * * * We do not imply that vendee herein would necessarily indulge in discriminatory practices, but the opportunity to do so would be present.

It is only in those instances where the services performed as a common and contract carrier are not competitive or where the commodities to be transported by the common and contract carrier are wholly different, that the Commission has approved dual operations. *Stang Contract Carrier Application*, 73 M.C.C. 513; *Kauffman & Minteer, Inc., Extension—Tullytown, Pa.*, 73 M.C.C. 691; *Refrigerated Transport Co., Inc., Extension — Frozen Foods*, 72 M.C.C. 459; *Refrigerated Transport Co., Inc., Extension—Loring, Kans.*, 72 M.C.C. 623; *Schaffer Trucking, Inc., Extension—Dairy Products*, 69 M.C.C. 249; *Superior Trucking Co., Inc., Extension—Texas*, 69 M.C.C. 515; *Schaffer Trucking, Inc., Extension—Lykens, Pa.*, 68 M.C.C. 4.

Again we raise the question: If a railroad or its affiliate bears a special burden, as the Commission holds, in justifying a grant of unrestricted rights, how can the Commission deny dual authority to independent motor car-

riers, as was done in the numerous cases cited, and at the same time here allow the railroad and its motor subsidiary to perform common and contract service for the same shipper between the same points and with respect to identical commodities? The situation here is even more fraught with possibility for discrimination than is the usual case involving dual operations. In addition to the duality of operations already referred to, PMT will have the right to handle, as a common carrier, any other freight, except automobiles, moving in or out of the plants involved.

In authorizing the widespread motor contract carrier operations involved, the Commission sought to avoid the stricture of §210 by requiring the rail subsidiary to request "in writing the imposition of a restriction against the transportation of automobiles and trucks in its outstanding certificates authorizing motor common carrier operations (77 M.C.C. 624; R. 32). This overlooks the Commission's prior report in the Sub. 34 case where it noted (71 M.C.C. 563-564; R. 58):

> Further, there is also a question as to whether we should grant such a permit in view of the extensive common carrier rail service now provided in the territory by applicant's parent corporation, the Southern Pacific Company. True, the provisions of section 210 of the act are applicable only to instances involving the holding of certificates and permits authorizing the transportation of property by motor vehicle, but even without the statutory requirements, we would be remiss in our duty were we to ignore the dual relationship between applicant, as a contract carrier by motor vehicle, and the Southern Pacific Company, as a common carrier by rail. We may inquire into the relationship incidental to the statutory findings necessary under section 209 of the act and in a proper case withhold a grant of authority or impose restrictions necessary to guard against the possibility of practices at which section 210 is aimed.

The Commission's report here under review relies for its approval of dual operations upon its prior decision in the Sub. 34 case,[29] which involved only transportation from Oakland to points in Oregon on the lines of the parent railroad. The report states (77 M.C.C. 623; R. 31): "The prior report in the Sub. 34 proceeding fully discusses the dual operation question and needs little enlargement o[r] repetition."

When the "full discussion" of the dual operation question in the prior Sub. 34 case is examined, a glaring inconsistency is disclosed. Far from having submitted proof there justifying dual operations, PMT had merely relied on the fact that the Commission had previously allowed it to perform such service. Referring to this, the Commission (71 M.C.C. 565; R. 60) said:

> Applicant's plea that it has relied upon our past approval of specific dual operations, we think, is without merit. Each successive grant of common or contract carrier authority which would result in dual operations must, under the statute, be accompanied by a finding that such resultant dual operations will be consistent with the public interest and the national transportation policy. Each such finding must be based upon the circumstances existing at the time the particular grant is made and each case must be decided on its own merits. Certainly, the express provisions of the act place applicant on notice that it should not rely upon a grant of temporary authority to foreshadow a subsequent grant of corresponding permanent authority.

Despite the clear warning in the first Sub. 34 report that PMT must, for the future, meet its burden of proof under §210, the Commission's majority here, less than a year and one-half later, in proceedings involving far more widespread operations than those in the prior case,

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[29] As noted, p. 5, *supra*, the Sub. 34 proceeding was reopened for reconsideration and consolidated with the other proceedings.

again permits this giant rail-motor combine to ignore the provisions of §210 by failing to present any evidence whatsoever on which a finding that the provisions of that section had been satisfied could properly be based. The gentle wrist slap administered by the majority (R. 32) to the effect that it might consider this issue at some vague future date "should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference" hardly serves as adequate performance of the Commission's obligation under §210 to require applicants seeking dual authority to present evidence *here and now* justifying such a grant, rather than merely relying, as PMT successfully did here, on past operations to satisfy the statutory requirements. Perhaps, in view of the marked contrast between the Commission's action in other cases, such as *Miller* and *Indianhead, supra*, in which it has refused to grant dual authority to independent motor carriers because of the mere possibility of discriminatory practices, and its action here, these appellants can be excused for wondering whether it imposes one, strict standard of proof, when independent carriers are involved and another, far easier standard, when the applicant happens to be a rail affiliate.

The dissenting expression of Commissioner Murphy emphasizes the failings in the majority's report on the issue of dual operations. He stated, in part, as follows (77 M.C.C. 628; R. 37-38):

> The objectionable dual operations involved provide a further reason for denying these applications. This question is dealt with summarily in the report even though it is doubtful that there has been a proceeding before us in which exhaustive consideration of this issue was more justified. We have consistently held that the propriety of approving dual operations is to be carefully considered in every proceeding in which this question arises, including those involving subsequent applications by a carrier now conducting

> dual operations with our approval, and is to be determined upon the basis of the particular circumstances of each case. I, therefore, do not consider of controlling significance insofar as our disposition of this issue in the instant case is concerned the fact that dual operations by this carrier have been approved in several unopposed application proceedings involving relatively limited contract carrier operations. In my opinion, we would be entirely justified in withholding our approval of further expansion of this carrier's dual operations. (Emphasis supplied)

Commissioner Murphy further stated (77 M.C.C. 628-629; R. 38):

> In numerous cases, we have held that the mere opportunity for indulging in the unfair or discriminatory practices contemplated by section 210 is sufficient to bar approval of dual operations. It would be difficult to visualize a situation in which more opportunity for such practices would be present than in the instant case in which a single shipper will be served by applicant in its dual capacity as a common carrier of general freight and a contract carrier of automobiles and trucks and by the Southern Pacific as a common carrier by railroad. The applicant has wholly failed to show good cause for approval of the dual operations here involved and the granting of approval under the circumstances of these cases establishes a precedent that will totally destroy the future effectiveness of section 210.

The facts of record strongly support our contentions and the above-quoted conclusions of Commissioner Murphy. Southern Pacific serves the assembly plants here involved as the *exclusive* rail carrier, and engages extensively in both the outbound distribution of new automobiles and trucks, and the inbound movement of frames and parts. (R. 187-188, 198, 200, 209-210, 225, 281 and 468). The record is silent on its participation in the outbound distribution of parts and accessories, but at a minimum it is proper to say that it has the opportunity to participate in this traffic either in all-rail movements

or in connection with the coordinated truck services of PMT. If the instant application is granted, Southern Pacific will continue to participate in the outbound movement of automobiles[30] and parts; and it will continue to engage extensively in the inbound movement of frames and parts. (R. 222, 225). The limitation imposed upon the common carrier operating authority of its motor subsidiary will in no way restrict the operations of the rail parent.

This transportation, performed for the same shipper in the same territory raises the very distinct possibility of discriminatory practices. Moreover, Southern Pacific's rail service on behalf of other automobile manufacturers located on the West Coast[31] raises the possibility that it could give preference to GM. The fact that the record does not reflect instances where Southern Pacific has engaged in such discriminatory or preferential practices does not relieve the Commission of its duty to protect against the opportunity for them. *Miller* and *Indianhead* cases, *supra*. This obligation is emphasized by the fact that severe rate competition for automobile traffic exists between rail and motor carriers. This has been commented upon by the Commission in several cases. See, e.g., *Passenger Automobiles in Southern Territory*, 288 I.C.C. 85, 93; *Chrysler Corp.* v. *Akron, C. & Y. R. Co.*, 279 I.C.C. 377, 416.

In addition to the rail operations of Southern Pacific, PMT as a motor carrier serves the plants of GM on both inbound and outbound shipments (R. 199-200, 346).

Considering the opportunities for discriminatory practices inherent in the multiple rail and motor operations

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[30] Although the Traffic Director of the Chevrolet Division (R. 207) indicated that eventually all traffic from the California plants involved would move by PMT. R. 223.

[31] For example, the record (R. 468) indicates that PMT's rail parent serves the Ford plant at Milpitas, Calif.

involved, we submit that the majority made a useless gesture in "depriving" PMT of the opportunity to transport GM automobiles as a common carrier. This "remedial" action blithely ignores the very real danger of violating the underlying policy of §210, resulting from PMT's other common carrier authority, coupled with the extensive motor contract rights granted, all added to the common carrier operations of its rail parent. The only possible way of eliminating the most objectionable feature of dual operations here involved would be to require PMT's rail parent to cease serving the GM plants. While this undoubtedly would not be acceptable to Southern Pacific, it is equivalent to a requirement which the Commission often imposes on independent motor carriers to eliminate the opportunity for discriminatory and preferential practices. In *Lindner Bros. Trucking Inc., Extension-Groceries*, 77 M.C.C. 651, 652, decided September 29, 1958, the entire Commission said:

> It is apparent that the granting of authority here to serve points now served by Advance would place that carrier and applicant in a position to engage in discriminatory practices in such commonly authorized territory. To give effect to the mandate of section 210, opportunities for discrimination must be avoided.
> • • •
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> Here we believe that modification of the findings in our prior report so as to prohibit service by Advance from the shipper's plant sites and warehouse facilities at Chicago would substantially lessen the opportunity for discrimination.

To sum up: As so clearly pointed out in Commissioner Murhpy's dissent, the Commission's majority has "summarily" treated the very important issue of dual operations. Its failure to require PMT to meet the burden of §210, disregarding as it does its own admonition in the first Sub. 34 case that reliance on past operations would not support future grants of dual authority, constitutes a clear abuse of discretion. Further, its favored treat-

ment of the rail subsidiary, contrasted with its strict application of the standards of §210 when independent motor carriers are involved, constitutes the very antithesis of the "fair and impartial regulation of all modes of transportation" required by the National Transportation Policy.

The Holding of The Majority Below That Plaintiffs Lacked Standing to Sue is Clearly Erroneous.

A majority of the court below held that plaintiffs lacked standing to bring this action in the District Court. This contention, made by PMT and General Motors, the intervening defendants, but not by the Commission, is based on the argument that plaintiff motor carriers were not a party in interest within the meaning of Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Appendix B, p. 3a, *infra*. The majority, however, conceded that, had the complaint been filed by some qualified "party in interest," all plaintiffs could have intervened pursuant to 28 U.S.C. §2323, 170 F. Supp. 48; R. 86. This raises the provocative question, not answered by the majority below, of just who is a "party in interest" in a case such as this if not the protestant motor carriers before the Commission? Who except them could be expected to contest the Commission's action, or who would have a greater right to take such action?

The majority below appears to have relied upon *Atchison, Topeka* and *Santa Fe Railway Co. v. United States*, 130 F. Supp. 76, *aff'd. per curiam*, 350 U.S. 892, as justifying its action here.[32] But that case merely held that *rail protestants* before the Commission were without standing to sue to set aside an I.C.C. order authorizing a

[32] We say the majority appears to have relied on the cited case because it is referred to in its recitation of the contentions of interveners on this point, although not cited by the majority specifically as grounds for its action.

merger of *motor carrier* applicants. A comparable situation, not present here, would be an effort by motor carriers to block the merger of two rail lines which the Commission had authorized.

The majority also noted that PMT and GM contended that *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U.S. 479, indicates that participation as interveners in a Commission proceeding does not *alone* furnish a basis for the required "interest" to institute suit to set aside a Commission order. We have never said it does.

We believe the *Alton Railroad* and *Interstate Council* cases next discussed clearly support our right to sue to set aside the order here involved.

In *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942), the shoe was on the other foot. There, a large group of railroads sued to set aside a Commission order authorizing the transportation of automobiles by one Fleming. Although most of the railroads had been parties to the proceeding before the Commission, their standing to bring suit to set aside its order was challenged. This Court said, *Id.*, at 19-20:

> They [the railroad companies] clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S.Doc. No. 152, 73d Cong., 2d Sess., pp. 13-27. They are members of the national transportation system which that Act was designated to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H.Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of §205(h) under the tests announced in Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; Western Pacific California R. Co. v. South-

ern Pacific Co., 284 U.S. 47, 52 S.Ct. 56, 76 L. Ed. 160, and Claiborne-Annapolis Ferry Co. v. United States, supra.

In *Interstate Common Carrier Council of Maryland, Inc.* v. *United States*, 84 F. Supp. 414 (1949), an organization representing numerous motor carriers brought suit to set aside a Commission order granting so-called alternate route authority to another motor carrier. In that case, the United States and the Interstate Commerce Commission, defendants, challenged the sufficiency of interest of the Council to bring the suit. The three-judge court held against the defendants, stating, *Id.*, at 422:

> With respect to the alleged incapacity of the Council the defendants rely largely on Merchant Truckmen's Bureau of New York v. United States, D.C., 16 F.Supp. 998, 999, where, in a somewhat similar case affecting the capacity of a membership corporation to maintain a suit to set aside an order of the Commission relating to the operation of a pick-up and delivery service by railroads, a three-judge court expressed doubt whether the association had the capacity to maintain the suit as a party in interest. That case was decided in 1936. But we think that the doubt there expressed under the earlier statute there involved has been sufficiently dispelled by what was said by the United States Supreme Court in Alton R. Co. v. United States, 315 U.S. 15, 18 and 19, 62 S.Ct. 432, 86 L.Ed. 586, the latter case dealing particularly with a complaint to set aside an order of the Commission under title 2 of the Transportation Act affecting motor carriers. As we read the latter case it seems to make it clear that a party in interest mentioned in §305(g) is not necessarily a person or corporation which was a party to the proceeding before the Commission, but may be one who has a real stake in the transportation statute which the order of the Commission affects. Thus, even if the Interstate Council is to be regarded as disqualified, the other complainants have sufficient capacity to sue.

Finally, we submit that the familiar rule requiring construction to avoid absurd results militates against the

holding of the majority below. Congress has clearly taken pains to subject Commission decisions to judicial review, even those formerly held exempt as "negative" orders. Yet the majority of the Court below has carved out a large exception, not based on any clearly delineated statutory language, but rather on the assumption that General Motors (or at least its Chevrolet Division) once having spoken, will never change its mind. The syllogism, roughly, amounts to this: The Chevrolet Division will not use the services of (1) motor common carriers, or (2) carriers who haul their competitors' automobiles; appellant motor carriers fall in one or both of these categories, and will therefore never be given any GM traffic; since they will get no traffic in any event they cannot be damaged by the Commission's grant of unrestricted authority to PMT, and therefore are not parties in interest within the meaning of §205(g). The application of this rationale leads to decidedly incongrous results. The policy underlying the proviso of §5(2)(b), like any other statutory provision that we know of, is not self-executing. Whether it is assumed that the policy represents an effort by Congress to protect the motor carriers from rail encroachment for their own benefit, or whether the intent was to serve the larger public interest by preventing rail domination of an otherwise competitive industry, one fact remains. The decision of the majority below insulates the order of the Commission here involved from challenge by any party to the proceeding before it. Suppose, for example, that the Commission, instead of purporting to comply with the Congressional mandate, had baldly stated that it could ignore it whenever it chose to do so? Under the reasoning of the majority of the court below, these appellants would still have had no standing to sue, because of GM's statement of intentions.

In the final analysis, the holding of the majority puts a shipper supporting an application before the Commission in the position of deciding whether or not protesting

carriers before that agency will have standing to challenge the Commission's order if it grants authority to the favored carrier. Suppose that GM, in this proceeding, had stated that if the Commission should deny PMT's application it would use the services of the protestant carriers? Presumably that would have given them standing to challenge the order here, since they then could claim dollar damage. We submit that such construction squarely conflicts with the Congressional intent underlying §5(2)(b) and the usual rule that for every right there is a remedy!

CONCLUSION AND PRAYER

The report and order of the Commission under review, authorizing the wholly-owned subsidiary of the Southern Pacific Railroad to perform extensive unrestricted motor contract carrier service in the transportation of automobile traffic for GM, while at the same time it performs common carrier operations for the same shipper with respect to other traffic, and its rail parent transports, as a common carrier, the identical commodities between the same points and places—all without any showing of exceptional circumstances which justify the Commission's departure from the Congressional policy against such grants of authority—is unsupported by and contrary to the evidence of record and contrary to law, to wit, the National Transportation Policy and Sections 5(2)(b), 209 and 210 of the Interstate Commerce Act.

The finding by the District Court, directly contrary to that of the Commission, that the testimony presented before the agency by applicant PMT and its supporting shipper, GM, constituted evidence of special circumstances justifying a grant of unrestricted authority, exceeds the court's powers on judicial review. Further, the holding by a majority of the court below that plaintiffs lacked standing to bring court action to review the Commission's report and order is clearly erroneous.

WHEREFORE, appellants pray that the judgment of the District Court be reversed and the case remanded with instructions to set aside the Commission's report and order, and require it to cancel the permit issued to PMT covering the operations authorized, and for disposition otherwise consistent with this Court's opinion.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC. and its CONTRACT CARRIER CONFERENCE

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twenty-fifth day of March, 1960, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and Willard R. Memler, Esq., Department of Justice, Room 263, 131 Indiana Ave., N. W., Washington, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Pacific Motor Trucking Co., by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert L. Pierce and William E. Meinhold, Esqs., 65 Market Street, San Francisco 5, California, and with postage prepaid, to Edward M. Reidy, Esq., Room 465, 1120 Connecticut Ave., N. W., Washington, D. C., and Thormund A. Miller, Esq., 205 Transportation Bldg., Washington 6, D. C.

4. On General Motors Corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Henry M. Hogan and Walter R. Frizzell, Esqs., 3044 West Grand Blvd., Detroit 2, Michigan, and with postage prepaid to Beverley S. Simms, Esq., 612 Barr Building, 910 17th Street, N. W., Washington 6, D. C.

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